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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1586

MARATHON OIL COMPANY, a corporation; and ROBERT LEHMAN, et al, d/b/a LEHMAN BROTHERS,
Petitioners

v.

GEORGE H. BRUCE; ROBERT MARTIN; and HON. LUTHER BOHANON, United States District Judge,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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NO. _____

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v.

GEORGE H. BRUCE; ROBERT MARTIN; and HON. LUTHER BOHANON, United States District Judge,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit issuing a writ of mandamus under the All Writs Act, 28 U.S.C. 1651(a), directing the district judge to grant a jury trial on Count I of a two-count amended complaint.[1]

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1. Count II of the amended complaint (R-3, Ex. "B", pp. 15-19) is an alternative claim against all of the petitioners, upon which relief is sought only "in the event the Court does not grant the equitable relief prayed for upon Count I" (R-3, Ex. "B", p. 18). The district judge ruled that in the event Count II is tried, the trial will be to a jury (R-3, Ex. "J", p. 2) and that ruling is not an issue in this proceeding.

OPINIONS BELOW

The majority and specially concurring opinions are not yet reported but are appended to this petition. (App. A).

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1970 (App. B).[2] Petition for rehearing and rehearing en banc was denied on February 17, 1971 (App. C, D). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there is a constitutional right under the Seventh Amendment to a jury trial of an action to impress on the grounds of an alleged misappropriation of confidential business information a constructive trust upon a long-term liquified natural gas sales contract between two American and two Japanese corporations and for an equitable accounting. Although the Tenth Circuit did not even mention that the principal relief sought by plaintiffs was impressing a constructive trust on the Japanese contract, nevertheless such is a fact because the relief plaintiffs sought was a "decree determining their *equitable right*" to participate with defendant Marathon in the Japanese contract and also determining the "precise *nature and extent*" of that equitable right. The accounting relief discussed by the Court was only secondary to the principal relief.

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2. The documents comprising the Transcript of Record certified by the Clerk of the Court of Appeals are listed in the Index thereto and will be referred to as "R-1", "R-2", etc., followed by a citation of the specific page number of the document or attached exhibit.

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The Seventh Amendment to the Constitution of the United States provides as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Rule 38(a), F.R. Civ. P., 28 U.S.C., provides as follows:

> "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

STATEMENT OF THE CASE

This mandamus action against the district judge and petitioners arises out of a proceeding brought in the United States District Court for the District of Kansas by the respondents George H. Bruce and Robert Martin as plaintiffs against petitioners Marathon Oil Company and 37 individuals alleged to be co-partners doing business under the name of Lehman Brothers as defendants. The basis for federal jurisdiction of the original proceeding is 28 U.S.C. 1332.

Count I of the amended complaint (R-3, Ex. "B", pp. 1-15) is an action against Marathon alone to impress a constructive trust upon its interest in a long-term liquefied natural gas (LNG) sales contract and for an

equitable accounting. The contract dated March 6, 1967, is between Marathon and Phillips Petroleum Company, American corporations, as sellers, and two Japanese utility corporations, as buyers. It is for a term of 15 years and provides for the sale and purchase of LNG, none of which is, or has ever been, owned by the plaintiffs in the original action. The gas is produced from leasehold estates owned by Marathon and Phillips in Alaska where it is liquefied and then transported by specially constructed ships to Japan.

Plaintiffs contend in Count I of their original action that they have equitable rights in the Japanese LNG project, and an equitable interest in the LNG contract, by virtue of an asserted breach by Marathon of fiduciary duties owed to them. The breach, so they claim, occurred in 1960 when they allege that Marathon wrongfully appropriated their confidential business information disclosed to it by them under an oral agreement of trust and confidence, and also wrongfully excluded them from participating with it in the sale of Marathon's LNG in Japan (R-3, Ex. "B", pp. 13-14).

They allege in Count I that in 1959 they and Lehman Brothers, whom they also name as defendants, formed a joint venture for the purpose of making detailed research, analysis and development of substantial markets for LNG in Japan; that pursuant to their joint venture agreement Martin and Lyon Terry, an experienced gas engineer in the employ of defendant Lehman Brothers, went to Japan where they made a comprehensive market survey and cost analysis involving the compilation and study of extensive data and information concerning the Japanese energy market, cost estimates of manufactured gas and

the price at which LNG would have to sell in order to be economically feasible in the Japanese market. They charge that while in Japan, Martin and Terry entered into negotiations with officials of two Japanese gas companies which ultimately resulted in a verbal agreement whereby, in consideration of plaintiffs undertaking further studies and attempting to develop a feasible source of LNG supply, the Japanese gas companies granted plaintiffs a right of first refusal to supply LNG to the Japanese market (R-3, Ex. "B", pp. 3-4).

It is also alleged that in the course of plaintiffs' efforts to locate a feasible source of LNG supply, they ascertained that Marathon had developed and had access to extensive natural gas reserves in the Kenai Peninsula of Alaska; that plaintiff Martin then contacted representatives of Marathon and informed them that he wanted to present a business proposal to Marathon upon a confidential basis; and that upon being assured by Marathon's representatives that all disclosures would be held in strictest confidence, Martin revealed the general nature and history of plaintiffs' and Lehman's proposed LNG project and disclosed the information which plaintiffs claim was subsequently wrongfully appropriated by Marathon (R-3, Ex. "B", pp. 4-5).

No claim, however, is made that Marathon ever actually agreed to join plaintiffs and Lehman Brothers in the proposed joint venture (R-3, Ex. "B", pp. 6-7).

It is, nevertheless, alleged by plaintiffs that the relationship between them and Marathon gave rise to, and imposed upon Marathon, the fiduciary duties which they allege it breached by appropriating to its own benefit their confidential information and data and by wrongfully

excluding them from the Japanese LNG project (R-3, Ex. "B", pp. 10, 14).

Plaintiffs also allege that by reason of the consummation of the Marathon-Phillips contract with the two Japanese utility companies, Marathon succeeded in appropriating the Japanese LNG market for itself and its associates, to their complete exclusion, and that their interests in, and equitable rights with respect to, the LNG project matured and vested (R-3, Ex. "B", p. 13). However, it appears that they are unable to allege with certainty the value or extent of their asserted equitable interest in Marathon's rights under the contract (R-3, Ex. "B", p. 14).

As stated earlier by way of relief on these allegations, plaintiffs' prayer in Count I is:

> "* * * [*F*]*or a decree determining their equitable right to participate with defendant Marathon in the aforesaid Japanese LNG project; that this Court adjudicate and determine the precise nature and extent of plaintiffs' said rights; that defendant Marathon be compelled to render a complete disclosure and accounting covering all details pertaining to said project; and that plaintiffs be granted any and all such further relief as the Court deems just and equitable* * * *" (R-3, Ex. "B", p. 15).

The district judge in denying plaintiffs a jury trial of Count I found and held that it was "pitched purely in equity, claiming an interest in a joint adventure" (R-3, Ex. "K", p. 31), and that the extremely complicated and technical problems involved in balancing the equities of plaintiffs' right to an interest in the project, and in the accounting which plaintiffs seek of money had and re-

ceived and to be had and received, not only for the past and present but also in years to come, were such that no jury on earth could understand them or be expected to give any kind of a fair answer (R-3, Ex. "K", pp. 31-41).

Thereafter, plaintiffs commenced this original proceeding in the Court of Appeals under Rule 21, F.R.A.P., 28 U.S.C., seeking a writ of mandamus to compel the district judge to grant them a jury trial on Count I. (R-3) On December 29, 1970, the Court entered judgment issuing the writ of mandamus (App. B). The majority opinion recognized that equitable relief in the form of an accounting was sought in Count I, but reasoned that under *Dairy Queen v. Wood,* 369 U.S. 469, the Court must look beyond the equitable relief sought and determine the true nature of the underlying claim (App., A-7). The majority then concluded that the underlying claim sounded in tort, upon which plaintiffs were entitled to a jury trial as a matter of right, and said their disposition of the matter was consistent with the rationale of such cases as *Ross v. Bernhard,* 396 U.S. 531; *Simler v. Conner,* 372 U.S. 221; *Dairy Queen v. Wood,* 369 U.S. 469; and *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (App., A-7-A-8). They completely overlooked that the accounting sought was only secondary to the primary equitable relief sought which is the creation in plaintiffs' favor of a constructive trust on Marathon's rights under the LNG sales contract.

Judge Holloway, in his concurring opinion, points out the primary error in the majority opinion by saying that it appears to treat as irrelevant the relief or remedy sought and then correctly holds that the Court must "look

at the nature of the remedies requested, among other things", citing *Ross v. Bernhard,* supra. But, he erroneously concludes that Count I is an action at law because the accounting claim "is viewed in substance as a money claim triable to a jury" (App., A-10).

REASONS FOR GRANTING THE WRIT

A. *Conflict with decisions of this Court.*

This case is of the utmost importance to the administration of justice in the federal courts for if the decision of the Court of Appeals is allowed to stand, it will cast aside completely the historic division between law and equity and enlarge the right to a jury trial in civil actions brought in the courts of the United States beyond the intendment of either the Seventh Amendment or the Federal Rules. In short, it will require a jury trial, when demanded, in suits in equity as well as actions at law. And, it will do so on a misconception of the doctrine announced in the *Beacon Theatres* case and later applied in the *Dairy Queen, Simler* and *Ross* cases, supra.

Whatever may have been the differences between the majority and minority in those cases, surely the majority opinions were not intended to nullify history, logic and over 100 years of firm precedent or to hold that a plaintiff has a constitutional right to a jury trial in a purely equitable suit to impress a constructive trust and for an accounting after such a trust has been impressed.

The majority opinion of the Court below, in determining whether Count I is equitable, simply ignores the basic equitable relief sought in Count I. It says at p. 11 (App., A-7) that "The fact that as concerns Count I equitable relief in the form of an accounting is sought does not

in and of itself preclude a right to a jury trial * * *", citing *Dairy Queen.* It thus would appear from the opinion that an accounting is the only equitable relief sought, which of course is not correct. Why the majority and concurring opinions fail to mention the basic equitable relief prayed for, and upon which an equitable accounting must depend, is not understandable. The relief plaintiffs seek is a *"decree determining their equitable right to participate"* in a contract to which they are not parties, and also determining the *"precise nature and extent"* of their equitable rights, together with an accounting. To grant the relief prayed for would necessitate a court of equity impressing a constructive trust of the "precise nature and extent" it might find equitable under the facts, upon Marathon's rights in the LNG sales contract subject to its liabilities under the contract.

The Seventh Amendment, by its express terms, does not extend, but merely *preserves,* the right to a jury trial "in all suits at common law." The right so preserved is limited to those actions which were triable to a jury under the common law of England as it existed in 1791 when the Amendment was adopted. *Baltimore & Carolina Line, Inc. v. Redman,* 295 U.S. 654. It does not extend or apply to suits in equity which were historically tried to the court. *United States v. Louisiana,* 339 U.S. 699; *Shields v. Thomas,* 18 How. 253.[3]

The *Beacon Theatres* doctrine is inapposite. There the Court merely held that the plaintiff did not have the right

3. The various Courts of Appeals have consistently held that there is no constitutional right to a trial by jury in an equitable action. See, e.g. *United States v. White County Bridge Commission,* 275 F.2d 529 (C.A. 7, 1960), cert. den., 364 U.S. 818; *Black v. Boyd,* 248 F.2d 156 (C.A. 6, 1957); *Gefen v. United States,* 400 F.2d 476 (C.A. 5, 1968), cert. den., 393 U.S. 1119.

to try its action in equity before the defendant tried its counterclaim and cross-action, which were actions at law. The actions involved the same issues, viz., whether the plaintiff had violated the Sherman and Clayton Antitrust Acts. Plaintiff had sought a declaratory judgment of no violation and injunctive relief restraining defendant from charging plaintiff with antitrust violations while defendant had by counterclaim and cross-action sought to recover treble damages for antitrust violations.

Although *Beacon Theatres, Dairy Queen, Simler,* and *Ross* hold that the Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action,[4] they do not hold that the relief sought is to be disregarded as the majority has done. Unlike in those cases, there is no joinder of "legal and equiable claims" in Count I of the amended complaint. We shall presently point out that, under the test established by this Court for determining such matters, Count I is a purely equitable claim.[5]

Furthermore, the *Beacon Theatres, Dairy Queen, Simler* and *Ross* cases are distinguishable from this case on the

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4. This is not to say, however, that the claim asserted is to be artificially broken down into abstract factual issues for the purpose of determining whether they are legal or equitable since as "a general proposition issues, in the abstract, are neither legal nor equitable, but their character must be determined from the proper nature of the claim or defense in which the issues are projected." 5 *Moore's Federal Practice* (2nd Ed.), ¶38.38[4], p. 307. "In the last analysis, the difference between an action at law and one in equity lies largely in the character of the relief sought or obtainable." 1 *Am. Jur. 2d, Actions,* § 7, p. 548.

5. The test for determining whether a claim is legal or equitable is by "considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Ross v. Bernhard,* 396 U.S. at 538, footnote 10.

facts. In *Beacon Theatres,* the complaint stated a claim traditionally cognizable in equity, while the counterclaim stated a claim for money damages which was triable by a court of law. In contrast, no counterclaim is here involved. Moreover, in *Beacon Theatres* the Court recognized that an action to declare no violation of the antitrust laws and for an injunction to restrain charges of antitrust violations was an equitable action, even though a treble damage action based on violations would be triable to a jury.

In *Dairy Queen* the action was for breach of a trademark licensing agreement and for trademark infringement, for which a money judgment was sought in the form of an accounting. The Court simply held that an action at law, which had for its purpose the recovery of damages or a debt, could not be converted into a suit in equity merely by the device of seeking an accounting, unless the accounts between the parties were so complicated that only a court of equity could satisfactorily unravel them. In this case, the primary and basic claim of the plaintiffs is not to recover a debt or damages. Rather, they seek a decree impressing a constructive trust on Marathon's interest in a contract between it and other parties over whom the trial court, the Court of Appeals and this Court have no jurisdiction. In addition, unlike *Dairy Queen,* the accounting sought is not for money damages, and could only be rendered following a decree determining the precise nature and extent of plaintiffs' asserted equitable rights. Moreover, it could only cover accrued sums and not future amounts, if any.[6]

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6. The distinction between an accounting in a legal sense and an equitable accounting is discussed further in the next section of this petition.

The *Simler* case held that the right to a jury trial is determined by federal rather than state law in diversity cases and, unlike this case, it was an action at law to recover a debt or damages. The same is true of *Ross.*

Turning now to the standard for determining whether a claim is legal or equitable, this Court has said that the first of the three factors to be considered which requires "extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply."[7] However, it clearly was the rule under the common law of England that courts of equity had exclusive jurisdiction over trust relationships. III *Blackstone, Commentaries,* pp. 431, 439.[8]

Pomeroy says that there are two great classes of trusts, namely, those created by the intentional act of the party having dominion over the property and those created by operation of law. 1 *Pomeroy's Equity Jurisprudence (5th Ed.),* § 152, pp. 206-207. He then says that the class of trusts "which in this country especially affords the widest field for the jurisdiction of equity in granting its special remedies so superior to mere recoveries of damages, embraces those which arise by operation of law" and they are of two species, "resulting" and "constructive." Id., § 155, p. 209. A constructive trust "is raised by equity for the purpose of working out right and justice where there was no intention of the party to create such a relation" and if "one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that

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7. *Ross v. Bernhard,* 396 U.S. at 538.

8. The historical development and origin of uses and trusts and the assumption by the chancery courts of jurisdiction over them is set forth in an excellent discussion in 3 *Pomeroy's Equity Jurisprudence (5th Ed.),* §§ 976-986a, pp. 890-914.

he cannot equitably retain the property which really belongs to another, equity carries out its theory of double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." Id., § 155, p. 210.[9]

It is therefore apparent that historically an action to impress a constructive trust or for the breach of a fiduciary duty was exclusively within the jurisdiction of equity. See, also, 27 *Am. Jur. 2d, Equity,* §§ 20, 63, pp. 542-544, 585; 54 *Am. Jur., Trusts,* §§ 3, 565, pp. 20-21, 440-441.

Moreover, this Court has also consistently held that where one party acquires the legal title to property, to which another has a better right, a court of equity will convert him into a trustee of the true owner. *Stark v. Starr,* 73 U.S. (6 Wall.) 402, 419; *Moore v. Crawford,* 130 U.S. 122; *Monroe Cattle Co. v. Becker,* 147 U.S. 47; *Prosser v. Finn,* 208 U.S. 67. This Court also recognized in *Ross v. Bernhard, supra,* 396 U.S. at 542, that allegations of "a breach of fiduciary duty" raise equitable issues.

The Court of Appeals, however, chose to ignore the foregoing principles apparently on the basis that the allegation of misappropriation of business and trade information disclosed under conditions of trust and confidence required it to conclude (1) that the action sounds in tort and (2) that it is therefore one at law, necessitating a jury trial, even though as clearly appears plaintiffs seek only equitable relief. The cases of *Smith v. Dravo Corp.,* 203 F.2d 369 (C.A. 7, 1953); *Harkobusic v. General American Transportation Corp.,* 209 F.Supp. 128 (W.D. Pa., 1962); and *Mann v. Tatge Chemical Co.,* 201 Kan.

9. See, also, 3 *Pomeroy's Equity Jurisprudence (5th Ed.)* § 920b, p. 618.

326, 440 P.2d 640, cited by the majority are all actions for money damages which is not the situation in the case at bar. Furthermore, the *Smith* and *Mann* cases were tried to the court, rather than a jury, and *Harkobusic* holds that suits for breaches of confidential relationships involving trade secrets, and for breaches of express promises not to disclose secrets, "may be brought in equity, and usually" are.[10]

The majority opinion, although ignoring the nature of the primary relief sought in Count I, does recognize that the secondary claim for an accounting in Count I is for "equitable relief." Not so in the concurring opinion. Judge Holloway holds that the accounting claim must be viewed in substance as a money claim triable to a jury. This holding clearly is not supported by the allegations of Count I. It is also contray to *Kirschner v. West Company,* 300 F.2d 133, 135-136 (C.A. 3, 1962) where the Court sets forth the test for determining whether an accounting is one in equity or at law by quoting the following from 4 *Pomeroy, Equity Jurisprudence,* § 1421:

> "The instances in which the legal remedies are held to be inadequate, and therefore a suit in equity for an accounting proper, are: 1. Where there are mutual accounts between the plaintiff and the defendant. . .

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10. The "Courts long have recognized that where the holder of a trade secret imparts it to another in confidence and that other person then appropriates it for his own use, equitable remedies may be invoked to right the wrong." *Servo Corporation of America v. General Electric Company,* 337 F.2d 716, 723 (C.A. 4, 1964). "It appears that one of the grounds upon which jurisdiction has been exercised by courts of equity to award relief where a trade secret has been used in violation of a confidence is the jurisdiction of equity over relationships involving trust or confidence." *Kirschner v. West Company,* 300 F.2d 133, 136 (C.A. 3, 1962).

> "2. Where the accounts are all on one side, but there are circumstances of great complication, or difficulties in the way of adequate relief at law. . .
>
> "3. Where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account."

It should be abundantly clear from the foregoing discussion that the issues raised in Count I are equitable both in terms of the premerger custom with respect to the issues and the remedy sought.

The third factor to be considered is, of course, the practical abilities and limitations of juries. In this connection, the district judge ably and clearly announced from the bench the extremely complicated and technical problems that would be involved in attempting to try Count I to a jury (R-3, Ex. "K", pp. 31-41)[11] and said "No jury on

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11. The problems discussed by the district judge may be summarized in the form of the questions to be resolved as follows: What is the value of the gas reserves owned by Marathon in Alaska which must be determined in considering the contributions made by each of the parties (plaintiffs and Marathon) to the proposed joint venture and having made that determination what rate of interest would Marathon be entitled to receive for holding the reserves for seven years for the benefit of the project; how soon are the reserves going to be depleted and what happens if they should suddenly be exhausted; what are the costs of the capital outlay for constructing the pipeline from the gas wells to a seaport and for the liquefaction equipment and facilities and what percentage did, or should, plaintiffs pay on the capital outlay, if any, and if none, what percentage rate of interest should plaintiffs pay to Marathon, or vice versa, for furnishing the money; what should be done about obsolescence and replacement of the equipment; what part, if any, should plaintiffs pay of the cost of constructing the specially designed ships to transport the LNG and if none, then what rate of interest should they pay to Marathon, assuming it has put up the money and must repay the same; what about obsolescence of the ships; what should be done with respect to management costs on the project and the expenses of production and drilling; how should the rights of the parties be

earth, I think could understand" them or "do equity between the parties" (R-3, Ex. "K", pp. 32, 38).[12] Petitioners, in their petition for rehearing, mentioned other additional problems involved in attempting to try Count I to a jury. (R-14, pp. 12-14)

The majority opinion fails to discuss the reasons given by the district judge for trying Count I as an equitable action and the concurring opinion passes them off by saying that the accounting claim is not shown to be excessively complicated. The question of whether Count I presents such "imperative circumstances"[13] or is so extremely complicated and technical that it cannot be tried to a jury should not be decided from the pleadings. *Harkobusic v. General American Transportation Corp.*, 209 F. Supp. 128 (W.D. Pa., 1962). The district judge had the benefit of many depositions and affidavits,[14] which plaintiffs did not include in the record in the Court of Appeals, and his findings must be accepted because

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adjusted in the light of the risks imposed on Marathon in the project including the risks of failure of the gas supply and dealing with people in a foreign country who might say "We cancel the contract. We won't use any more of your gas"; what is the value of the discovery of the Japanese market as claimed by the plaintiffs and of the claimed confidential information and verbal agreement with the Japanese; and finally there is the element of the accounting plaintiffs seek from Marathon of moneys had and received and to be had and received, not only for the past and present but, also, in years to come.

12. It might also be said that no court on earth could properly and understandably instruct a jury on the complex issues such as those summarized in the preceding footnote.

13. See *Dairy Queen v. Wood*, 369 U.S. 469; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500.

14. The depositions and affidavits were before the district judge in connection with the motion to dismiss for want of jurisdiction. (R-3, Ex. "D")

they do not appear to be clearly erroneous. Rule 52(a) F.R.Civ.P. Moreover, the findings of the district judge cannot be attacked because respondents in their original mandamus action did not include the record on which the district judge made his findings. See *Jensen v. United States,* 326 F.2d 891, 893 (C.A. 9, 1964).

The inescapable conclusion is that a consideration of the three factors clearly establishes that Count I is an equitable claim.

B. *Conflict with decision of another Court of Appeals.*

The majority and the concurring opinions are in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Local No. 92, International Ass'n, S. & O. I. Wks. v. Norris,* 383 F.2d 735 (1967), where it was unequivocally held that issues such as those here involved in both the primary and secondary claims for relief are in name and in substance traditionally equitable. The Fifth Circuit therefore held that there was no mandatory right to a jury trial. In so holding, it gave full consideration to the *Beacon Theatres* and *Dairy Queen* cases and to one of its own prior decisions[15] and concluded that those cases had not "converted typical non-jury claims, or remedies, into jury ones" and were not "a catalyst which suddenly converts *any* money request into a money claim triable by jury."[16] (383 F.2d at 741)

The Fifth Circuit went on to discuss the distinction between an accounting in a legal sense and an accounting

15. *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.,* 294 F.2d 486 (1961).

16. This was the express holding by the Fifth Circuit in its earlier case of *Swofford v. B & W Inc.,* 336 F.2d 406 (1964).

in equity and distinguished *Dairy Queen* saying that "we construe the present complaint not as seeking 'damages in the legal sense' but rather 'requesting an equitable accounting wherein damages may be determined . . .'" and that framing "the prayer for relief of the complaint in terms of an 'accounting' was neither an empty verbal formalism nor a sham employed merely to defeat Thacker's right to a jury determination of the extent if any, of his breach of trust." It then analogized the fiduciary responsibilities involved in the case with those of a trustee and recognized that traditionally "the remedies of the beneficiary of a trust against the trustee were exclusively within the jurisdiction of equity." (383 F.2d at 741)

The case at bar is indistinguishable from the Fifth Circuit decision. The basis for relief and the issues involved are identical. Count I of the amended complaint requests "an equitable accounting" rather than "damages in the legal sense" and the prayer is "neither an empty verbal formalism nor a sham employed merely to defeat" the right to a jury trial. The only difference between the two cases is that in the case at bar the district judge, as previously discussed, has made express findings on "the exceedingly complex nature" of the issues raised, and accounting sought, in Count I.[17]

The two decisions are in irreconcilable conflict which should be resolved by this Court on review by writ of certiorari.

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17. This Court recognized in *Dairy Queen* that even the right to a jury trial on *legal issues* could be lost under "imperative circumstances". (369 U.S. at 472-473; and see the concurring opinion of Mr. Justice Harlan, 369 U.S. at 480).

C. *Exercise of the power of supervision.*

This is also one of those rare cases in which certiorari should be granted because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to plainly call for the corrective exercise of this Court's power of supervision. As we have pointed out, Count I is a purely equitable claim and the accepted and usual course of judicial proceedings from time immemorial has been to try such claims to the court. The Court of Appeals has nevertheless by means of the extraordinary writ of mandamus, ordered the district judge to grant plaintiffs a jury trial on their equitable claim. There is no basis in history, logic, the Constitution or the decisions of this Court for that action and it should be corrected by the exercise of this Court's power of supervision.

Beyond the purely legal basis, however, there are also policy considerations which make the Court's virtually unlimited enlargement of the Seventh Amendment right to trial by jury improvident as well as unwarranted. It is common knowledge that the American system of jurisprudence is today facing its greatest crisis. One of the most alarming and troublesome areas contributing to, if not creating, the crisis is the unprecedented backlog of cases and the congested calendars of almost every federal court in the United States.

It has been suggested that one of the solutions to the problems in our system is to restrict the right to a jury trial[18] for there can be no doubt that jury trials are more expensive and time consuming than court trials. However,

18. See Warren E. Burger, Agenda for Change, 54 *Am. Jud. Soc.*, pp. 232-236.

under the decision of the Court of Appeals, the right is not restricted. Rather, it is enlarged to such an extent that litigants will not only be entitled to a jury trial in actions at law but also in equity suits. Such a result can only further aggravate an already serious situation. It should be corrected by directions from this Court to return, once again, to the time-honored principle of trying equitable claims to the court, rather than a jury.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
TENTH CIRCUIT

NOVEMBER TERM—1970

NO. 435-70

GEORGE H. BRUCE and ROBERT MARTIN,
Petitioners,

v.

HON. LUTHER BOHANON, UNITED STATES DISTRICT JUDGE, MARATHON OIL COMPANY, a Corporation; and ROBERT LEHMAN, et al, d/b/a LEHMAN BROTHERS,
Respondents.

Appeal from the United States District Court for the District of Kansas

(D.C. No. W-3901)

(Filed December 29, 1970)

Robert C. Foulston and Robert L. Howard (Foulston, Siefkin, Powers and Eberhardt on brief) for Petitioners.

No appearance for the Honorable Luther Bohanon.

Clayton L. Orn (Mark H. Adams, Floyd E. Jensen, Adams, Jones, Robinson and Manka on brief) for Respondents.

Before SETH, HOLLOWAY and McWILLIAMS, Circuit Judges

McWILLIAMS, Circuit Judge.

Bruce and Martin, petitioners in this court and plaintiffs in the trial court, filed with us a "Petition for Writ of Mandamus and/or Prohibition," naming as respondents therein the Honorable Luther Bohanon, a United States District Judge, the Marathon Oil Company, an Ohio corporation, and the individual members of a New York investment banking copartnership doing business as Lehman Brothers.

From the record before us it is learned that Bruce and Martin, as plaintiffs, filed in the trial court a complaint against Marathon, and that by amended complaint added Lehman Brothers as an additional party defendant.

The central issue in the instant proceeding concerns the propriety of the trial judge's determination that Count I of the amended complaint presents only so-called equitable issues which would be tried by the court, and not a jury. A review of this determination necessarily involves a rather in depth consideration of plaintiffs' lengthy amended complaint in an effort to ascertain the true nature of the proceeding. Hence, reference with at least a degree of detail must be made to the various allegations contained in the amended complaint.

Respondents (not including Judge Bohanon, who makes no appearance) in their brief characterize Count I as being "an action against Marathon alone for the alleged

wrongful appropriation in January 1960 of so-called confidential information which plaintiffs claim was disclosed to Marathon under an oral agreement of trust and confidence." Elaborating a bit, plaintiffs in Count I allege, among many other things, that they formed a joint venture with Lehman Brothers for "the purpose of detailed research, analysis, and development of the substantial Japanese market for LNG [liquefied natural gas]"; that Martin and an experienced gas engineer associated with Lehman Brothers then went to Japan and "conducted a comprehensive market survey and cost analysis concerning the Japanese energy market, cost estimates of manufactured gas and the price under which LNG would have to sell in order to be economically feasible in the Japanese market"; and that while in Japan their negotiations with officials of certain Japanese utility companies culminated in a verbal agreement that in consideration for further studies to be made by the plaintiffs they would be, and were, granted a first right of refusal as regards supplying LNG to the Japanese market.

It is further alleged in Count I that following Martin's return from Japan the plaintiffs undertook a study to determine possible sources of LNG adequate to supply the Japanese market requirements and that in the course of the study plaintiffs learned that Marathon had recently developed and had access to extensive natural gas reserves in the Kenai Peninsula of Alaska, for which there was seemingly no Alaskan market.

It was in this general factual setting, according to the allegations in Count I, that Martin then contacted Marathon and informed their representative that he "wanted to present a business proposal to defendant Marathon upon

a confidential basis." It is further alleged that after being assured that all disclosures made by Martin would be treated by Marathon in strictest confidence, Martin thereafter revealed the general nature and history of plaintiffs' proposed LNG project, and disclosed to Marathon plaintiffs' data, information, computations, market surveys, cost analyses, and their business contacts with appropriate Japanese officials.

Plaintiffs then go on to allege, and all in Count I, that Marathon and Lehman Brothers thereafter conspired and agreed that Marathon alone, and to the complete exclusion of the plaintiffs, would proceed to develop the Japanese methane market. Specifically, it is alleged that Marathon violated its fiduciary duty to the plaintiffs and appropriated to its own use plaintiffs' confidential information and wrongfully excluded plaintiffs from the Japanese LNG project, all of which came to fruition when Marathon and its associates, but not the plaintiffs, entered into contracts with the Tokyo Gas Company and Tokyo Electric Power Company.

It is on these several allegations that plaintiffs prayed for judgment on Count I, seeking by way of relief a determination of an equitable right to participate with Marathon in their Japanese LNG project and for an accounting in connection therewith.

As above indicated, Count II, unlike Count I, is directed at both Marathon and Lehman, but each and every allegation contained in Count I is incorporated in Count II by appropriate reference thereto. Additionally, and quite like certain of the allegations in Count I, it was alleged in Count II that Marathon and Lehman Brothers "conspired and joined together to exclude the plaintiffs

from further participation in the Japanese methane market, to facilitate and permit the defendant Marathon to usurp and wrongfully use the confidential information previously imparted to it by plaintiff Martin * * *." By way of relief, but in the alternative and in the event the court did not grant the relief prayed for in Count I, plaintiffs sought joint and several judgment against Marathon and Lehman in the sum of $10,000,000.

By answer Marathon and Lehman denied any conspiracy on their part or wrongful appropriation of any confidential business information imparted to either by plaintiffs.

By pretrial order, the Honorable Luther Bohanon proposed, among many other things, to try the issues posed by Count I and Marathon's answer thereto before any possible trial of Count II. Additionally, and this is the heart of the present controversy, he determined that the trial of Count I would be to the court and not a jury, even though plaintiffs had filed a demand for trial by jury before any answer was filed. The trial judge gave as his reason therefor the fact that in his considered view Count I presented "equitable" issues, and not "legal" issues, at the same time indicating, however, that if, as, and when there was a trial of Count II, such would be to a jury. It was in this setting and at this juncture that plaintiffs, as petitioners in this court, filed a petition seeking, among other things, that the respondent judge be directed to grant plaintiffs a trial by jury on Count I of their amended complaint.

Initially, it is contended by counsel for Marathon and Lehman Brothers that mandamus is not the proper vehicle for obtaining review of the trial judge's ruling that

Count I would be tried to the court, and that petitioners should have sought such review by interlocutory appeal under 28 U.S.C. § 1292(b) or by appeal after final judgment. Counsel apparently concede that under certain circumstances a writ of mandamus may be a proper method for obtaining review of an interlocutory order of the trial court, but argue that such relief is not available in the "ordinary situation," and that the present proceeding is just an "ordinary situation." We do not agree.

In Dairy Queen v. Wood, 369 U.S. 469, in commenting upon Beacon Theatres, Inc. v. Westover, 359 U.S. 500, the United States Supreme Court declared that the Beacon case emphasizes the responsibility of Federal Courts of Appeal to grant mandamus where necessary to protect the constitutional right to trial by jury. In line with this pronouncement see General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir.); Filmon Process Corp. v. Sirica, 379 F.2d 449 (D.C. Cir.). In the latter case appears the following pertinent comment:

> "* * * [I]t is a fair inference that even on an application for an extraordinary writ for pre-trial relief the Supreme Court expects the courts of appeals to make a determination whether or not there is a right of trial by jury, regardless of whether the question is a close or complicated one, and that the Court would not welcome a doctrine whereby a party's constitutional right to jury trial was trammeled in fact because a court of appeals determined that the issue was doubtful and that it need not and would not decide whether or not the party had the right of trial by jury * * *."

As indicated, the real issue in the instant proceeding is whether under the Seventh Amendment to the Con-

stitution of the United States and Fed. R. Civ. P. 38(a) and 39(a), the petitioners, having made a timely demand for trial by jury, have a right to a trial by jury of Count I of their amended complaint. We conclude that the petitioners do have such a right and that the respondent judge erred in holding that the trial as it relates to Count I should be to the court.

Count I of the amended complaint, a lengthy pleading which has been above summarized, in essence alleges that the plaintiffs developed certain business and trade information which they disclosed under conditions of confidence to Marathon, and that Marathon thereafter wrongfully appropriated this confidential information to its own benefit and to the detriment of the plaintiffs.

The fact that as concerns Count I equitable relief in the form of an accounting is sought does not in and of itself preclude a right to a jury trial, as it has been declared that the right to trial by jury does not depend upon the choice of words used in pleadings. Dairy Queen v. Wood, 369 U.S. 469. See also King v. United Benefit Fire Insurance Co., 377 F.2d 728 (10th Cir.), cert. denied 389 U.S. 857. Rather, we must look beyond the relief sought and determine the true nature of the underlying claim upon which the prayer for relief is itself predicated. Viewed in this light, petitioners assert that Count I sounds in law—not in equity—and that the core issue as to whether there has in fact been a wrongful appropriation presents a legal issue which, under the circumstances, requires that Count I be tried to a jury. We agree.

In sum, Count I alleges that Marathon tortiously misappropriated business and trade information developed by the plaintiffs and given Marathon on a confidential

basis to the plaintiffs' detriment. We hold that such a claim sounds in tort. Restatement of Torts, § 757. See also Smith v. Dravo Corp., 203 F.2d 369 (7th Cir.); Harkobusic v. General American Transportation Corp., 209 F. Supp. 128 (W.D. Pa.); and Mann v. Tatge Chemical Co., 201 Kan. 326, 440 P.2d 640.

Robine v. Ryan, 310 F.2d 797 (2d Cir.) presents a somewhat analogous situation. There it was held that the allegation that one has been injured by another's wrongful appropriation to his own use of an invention divulged on the basis of a confidential relationship stated a legal cause of action which upon timely request should be tried by a jury.

Certainly the present trend in judicial thinking is to zealously guard the right to trial by jury, and we believe our disposition of the matter to be in harmony with the rationale of such cases as Ross v. Bernhard, 396 U.S. 531; Simler v. Conner, 372 U.S. 221; Dairy Queen v. Wood, 369 U.S. 469; and Beacon Theatres, Inc. v. Westover, 359 U.S. 500.

Finally, it is argued that even if the petitioners at one time had a right to trial by jury of Count I, they by their actions have now waived any right thereto. As above stated, petitioners filed a demand for trial by jury before Marathon and Lehman Brothers ever filed their answer. Hence their demand was timely filed. Fed. R. Civ. P. 38(b). However, it is said that prior to the filing of their demand petitioners waived their right to trial by jury. This argument is based on the fact that at an earlier hearing counsel for the petitioners indicated uncertainty as to whether Count I was legal or equitable in nature and

for the further reason that counsel did not object when the trial judge at one time indicated that *he* would try the issue of liability first and separate from the issue of damages. Suffice it to say in this regard that the matter relied upon as constituting a waiver simply does not add up to an intentional and voluntary relinquishment of a known right and falls far short of waiving the very basic right of trial by jury. The cases urged upon us in this regard are ones where the right to trial by jury was deemed waived by permitting the trial to be to the court, without any objection thereto, or where prior to actual trial there was expressed assent by counsel that the trial be to the court and not a jury. Such factual situations are far different from the instant one.

The petition insofar as it relates to petitioners' right to trial by jury of Count I is therefore granted. The balance of the relief prayed for by petitioners, however, is denied and we perceive of no good purpose in detailing our reasons therefor, inasmuch as the central issue is petitioners' right to trial by jury of Count I. The stay heretofore ordered by this court is vacated, with further proceedings to be consonant with the views herein expressed.

HOLLOWAY, Circuit Judge, concurring specially:

I agree with the majority opinion in its treatment of the issues before us, but on the central question of jury trial I add these brief comments to make clear my understanding as to why count one is triable to a jury.

The majority opinion appears to treat as irrelevant the prayer in count one which seeks relief in the form of an accounting, reasoning that we must look beyond the relief sought and its label to the underlying tort alleged, which is triable to a jury. While the characterizations in the pleadings are not controlling, we are called on to look at the nature of the remedies requested, among other things. See Ross v. Bernard, 396 U.S. 531, 538. In the light of Seventh Amendment principles the accounting claim—which is not shown to be excessively complicated —is viewed in substance as a money claim triable to a jury. Dairy Queen v. Wood, 369 U.S. 469, 477-478; AMF Tuboscope, Inc. v. Cunningham, 352 F.2d 150, 153 (10th Cir.). And since the issues on one of the remedies requested in the count are triable to a jury, the plaintiffs may not be denied a jury trial in the circumstances presented here. Beacon Theatres v. Westover, 359 U.S. 500.

APPENDIX B

NOVEMBER TERM - DECEMBER 29, 1970

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., and Honorable Robert H. McWilliams, Circuit Judges.

No. 435-70

George H. Bruce and Robert Martin,
Petitioners

v.

Hon. Luther Bohanon, United States District Judge,
Marathon Oil Company, a Corporation; and
Robert Lehman, et al., d/b/a Lehman Brothers,
Respondents.

This cause came on to be heard on petition for writ of mandamus and/or prohibition and responses thereto, and was argued by counsel. On consideration whereof, it is ordered that the stay heretofore ordered by this Court on September 3, 1970, is vacated, and the Court below is required in further proceedings to allow petitioners their right to trial by jury of Count I, with further proceedings to be consonant with the views expressed in the opinion. Holloway, Circuit Judge, concurring specially.

/s/ HOWARD K. PHILLIPS,
Clerk.

APPENDIX C

JANUARY TERM - FEBRUARY 17, 1971

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., and Honorable Robert H. McWilliams, Circuit Judges.

No. 435-70

George H. Bruce and Robert Martin,
Petitioners

v.

Hon. Luther Bohanon, United States District Judge,
Marathon Oil Company, a Corporation; and
Robert Lehman, et al., etc.,
Respondents.

Upon consideration of petition of respondents for rehearing, it is ordered that said petition be and is hereby denied.

APPENDIX D

JANUARY TERM - FEBRUARY 17, 1971

Before Honorable David T. Lewis, Chief Judge; and Honorable Oliver Seth, Honorable William J. Holloway, Jr., and Honorable Robert H. McWilliams, Circuit Judges.

No. 435-70

George H. Bruce and Robert Martin,
Petitioners

v.

Hon. Luther Bohanon, United States District Judge,
Marathon Oil Company, a Corporation; and
Robert Lehman, et al., etc.,
Respondents.

Upon consideration of the petition of respondents for rehearing en banc, it is ordered that said petition be and is hereby denied; Judge Hill, Circuit Judge, not participating.